No. 87-319

Supreme Court, U.S.
FILED
AUG 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DALE ABRAHAMS, DANIEL BRUNO, MARCENE E. EDELMAN, ABRAHAM GENDERSON, GINNY M. GRUNLEY, JOHN M. HART, JOANN M. HOLMES, PHILIP PFATT, JR., LIBBY B. POHORYLES, SHARON H. POHORYLES, LARRY D. ROLLINS, ROCHELLE POULOS, NORMAN SCHAECHTER, MAHENDRA SHAH, EDWARD S. STOLL, LINDA W. SWAN, GARY ABRAHAMS, LEWIS B. COGGAN, STEPHEN L. EDELMAN, CHARLOTTE GENDERSON, KENNETH M. GRUNLEY, A. STEWART HOLMES, STEPHEN G. PARKER, LOUIS POHORYLES, STEVEN E. POHORYLES, JAMES A. POULOS, MONA SCHAECHTER, GEETA SHAH, EDWARD S. STOLL, JANE M. STOLL, CARL WEBER, Objectors.

Petitioners,

vs.

LOUIS SHULMAN, Derivatively on Behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC., and CENTRAL JERSEY INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether in determining the fairness of the settlement of a stockholder's derivative action involving substantial factual and legal questions, the District Court accorded objecting stockholders constitutional due process and fulfilled its judicial responsibilities: (a) when it refused to grant objecting stockholders pre-trial discovery and any kind of evidentiary hearing with the right of cross examination; (b) when it summarily approved the settlement without making findings of fact and conclusions of law; and (c) when it failed to write an opinion or any other explanation of the reasons for its approval of the settlement.

2. Whether the United States Court of Appeals for the Third Circuit failed to fulfill its judicial responsibilities and obligations by affirming the de-

termination of the District Court by a judgment order: (a) without writing an opinion or other memorandum explaining its failure to apply to this case, the statutory and other due process standards propounded and applied in other similar cases by the Supreme Court, and the Third Circuit; (b) without writing an opinion or memorandum adjudicating a corporate question of exceptional importance to corporate stockholders and investors, involving corporate democracy and the right of corporate directors, without stockholder approval, to issue dual classification stock which redistributes voting power and takes it away from stockholders for the benefit of a controlling stockholder; and (c) without writing an opinion or memorandum adjudicating a corporate question of exceptional importance to corporate stockholders, involving the valuation of

corporate securities in connection with a recapitalization or exchange of securities, which was part of the settlement of a stockholders derivative action.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1987

No.

Dale Abrahams, Daniel Bruno, Marcene E. Edelman, Abraham Genderson, Ginny M. Grunley, John M. Hart, Joann M. Holmes, Philip Pfatt, Jr., Libby B. Pohoryles, Sharon H. Pohoryles, Larry D. Rollins, Rochelle Poulos, Norman Schaechter, Mahendra Shah, Edward S. Stoll, Linda W. Swan, Gary Abrahams, Lewis B. Coggan, Stephen L. Edelman, Charlotte Genderson, Kenneth M. Grunley, A. Stewart Holmes, Stephen G. Parker, Louis Pohoryles, Steven E. Pohoryles, James A. Poulos, Mona Schaechter, Geeta Shah, Edward S. Stoll, Jane M. Stoll, Carl Weber, Objectors.

Petitioners

v

LOUIS SHULMAN, derivatively on behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC., and CENTRAL JERSEY INDUSTRIES, INC.

Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

Neither the District Court nor the Court of Appeals wrote any opinion or explanation of the reasons for their determination.

Jurisdiction

The judgment order of the United States Court of Appeals for the Third Circuit (Appendix Page A1) was entered on May 27, 1987. A timely petition for rehearing was denied on June 24, 1987 (Appendix Page A3). The jurisdiction of the Supreme Court is invoked under 28 USC Sec. 1254 (1).

The jurisdiction of the United States District Court was based on 28 USC Sec. 1332(a).

The Jurisdiction of the United States Court of Appeals for the Third

Circuit was based on 28 USC Sec. 1291.

STATEMENT PURSUANT TO
SUPREME COURT RULE 21

There were no other parties to the proceeding in the court whose judgment is sought to be reviewed.

Statutes Involved

CONSTITUTION OF THE UNITED STATES OF AMERICA -

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court,and notice of the proposed dismissal or compromise shall

be given to shareholders or members in such manner as the court directs

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the

extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

28 USC SEC 2071

Sec. 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

INTERNAL OPERATING PROCEDURES OF THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

IOP CHAPTER 6. JUDGMENT ORDERS

A. Criteria.

A case may be terminated in this court by a judgment order:

1. Panel unanimity.

a. When the panel unanimously determines that a judgment of the district court or a decision of the United States Tax Court or a decision or order of an administrative agency should be affirmed or enforced and that a written opinion would have no precedential or institutional value; and

b. any one or more of the following circumstances is dispositive of a matter submitted for decision:

(1) That a judgment for the district court is based on findings of fact which are not clearly erroneous;

(2) That sufficient evidence supports

a jury verdict.

(3) That substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(4) That no error of law appears;

(5) That the appeal is a civil diversity case under 28 U.S.C. Sec. 1332, the result of which does not turn upon an interpretation of the Federal Rules of Evidence for the United States District Courts and Magistrates;

STATEMENT OF CASE

Objecting stockholders of Central Jersey Industries (CJI), a New Jersey public corporation, owning 40,000 shares of common stock representing an investment of $1,000,000 at market value,[1]

(1) At the time of the submission of this matter to the district court on April 28, 1986 the

petition this court for a writ of certiorari to review an order and judgment of the United States District Court for the District of New Jersey, which summarily approved the settlement of a stockholder's derivative action. The district court denied the objecting stockholders the right to pre trial discovery; did not hold an evidentiary hearing with the right to cross examination; failed to make findings of fact and conclusions of law; and did not write an opinion or any other explanation for its summary approval of the settlement. Upon appeal to the United States Court of Appeals for the Third Circuit, that court affirmed the district court by a judgment order. The Third Circuit did not write any

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shares of CJI were selling on the Philadelphia Stock Exchange for approximately $25 per share. Since the approval of the settlement by the district court the shares have declined in value and are now selling at approximately $14 per share.

opinion or give any reasons for its affirmance.

The jurisdiction of the United States District Court was based upon 28 USC Sec. 1332(a). The jurisdiction of the U.S. Court of Appeals derived from 28 USC Sec. 1291.

STATEMENT OF FACTS

At the times here involved, CJI was a New Jersey corporation whose stock was listed on the Philadelphia Stock Exchange. Triangle Industries, Inc. ("Triangle") was a Delaware corporation, listed on the New York Stock Exchange.

On September 25, 1984 and November 30, 1984, Triangle[(2)] acquired a 22% controlling interest in CJI. Seven months later, on June 3, 1985, Triangle

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(2) Triangle held its interests in CJI directly and through its subsidiary, Rowe Holdings, Inc.; these entities are collectively referred to herein as "Triangle."

caused CJI to purchase from Triangle all of the stock of Triangle's subsidiary, Rowe International, Inc. ("Rowe"). This transaction increased Triangle's voting control of CJI from 22% to 44%.

CJI paid $73.5 million for the Rowe shares. This was 73.5 times Rowe's average two-year earnings before taxes.

At the time of the sale, CJI had a five-person board of directors which was controlled by Triangle.

On or about June 25, 1985, some three weeks after the Rowe transaction, the plaintiff commenced a stockholders derivative action against Triangle.

The essence of the complaint is that the controlled board of CJI, and CJI's controlling stockholder, Triangle, caused CJI to purchase the Rowe shares at a price greatly disproportionate to the value of the assets purchased, thereby causing waste of CJI's assets for the

benefit of Triangle.

On or about November 29, 1985, five months after the derivative action was commenced, the plaintiff agreed to settle the case. At that time, no discovery had taken place. After the settlement was agreed upon, plaintiff proceeded perfunctorily and superficially to take some depositions.

At the time of the settlement, the CJI six-member Board was still dominated by Triangle.

The settlement involved an exchange of securities between CJI and Triangle. Among the securities given by CJI to Triangle were shares and warrants which had features uniquely designed to benefit Triangle, and in particular, 320,000 shares of a newly created class C common stock which had three voting rights per share in contrast to the one vote per share voting rights of the other common

stockholders. This was the only stock ever issued by CJI which provided for three voting rights per share. It was created and issued solely by action of the Triangle controlled Board without stockholder approval. The issuance of this stock gave Triangle 44% voting control and redistributed the voting power of the common stockholders by taking from them 22% of their voting power, and giving it to Triangle.

To justify the original purchase of the Rowe shares by CJI from Triangle, Triangle had employed the investment banking firm of LF Rothschild Unterberg, Towbin ("Rothschild") to make an evaluation of the securities and give an opinion as to the fairness of the transaction. In order to justify the exchange of securities in connection with the settlement, Triangle also selected Rothschild to make a valuation of the securi-

ties and give a fairness opinion. In both instances, Rothschild was in a fundamental conflict of interest with CJI, which resulted from Rothschild's ownership of 5.6% of Triangle's stock, and its business relationship to Triangle. Instead of valuing the securities given by CJI to Triangle on the basis of their actual value to Triangle because of the unique features which made them extremely valuable to Triangle, Rothschild low balled their value by basing its valuation on a so-called value in a theoretical open market.

Pursuant to FRCP 23.1, a notice of settlement was sent to the stockholders of CJI inviting objecting stockholders to appear at the district court for that purpose on April 28, 1986. The petitioners appeared as objectors and requested an adjournment for the purpose of conducting pre hearing discovery in

preparation for an evidentiary hearing. The district judge granted the adjournment, and requested that the petitioners submit papers to show him that they were entitled to pre hearing discovery.

The petitioners submitted the affidavit of an expert which concluded that the settlement would result in a loss of $5.3 million to the minority stockholders of CJI and a gain of $10 million to Triangle, so that CJI was in effect paying Triangle to settle its case against Triangle. The petitioners also submitted a fifty page brief showing the existence not only of important legal issues, but as well, of important factual questions as to the valuation of the securities and the fairness of the settlement, which required an evidentiary hearing and cross examination of Rothschild.

The derivative plaintiff did not submit any supporting papers as to either

the fairness of the original Rowe transaction or of the settlement. He chose to rely on the fairness opinions of Rothschild even though his attorneys had obtained an opinion from an expert retained by him at the outset of the litigation, to the effect that the original purchase of the Rowe shares from Triangle was unfair to CJI and would result in a substantial recovery. When this opinion was accidentally uncovered by one of the petitioners' attorneys, plaintiff's attorneys tried to suppress it by first denying that it existed, and then claiming that it was protected work product. The court finally directed that it be made available to petitioners' counsel.

The document in question was highly critical of the Rowe transaction from the point of view of CJI and concluded in part that "on the surface, it does not

appear that Triangle has dealt fairly with Central Jersey Industries in relation to its less than arms length sale of Rowe."

The district court disregarded the genuine issues of fact and law which existed as to the fairness of the settlement, and the valuation of the shares, and the fairness of the original Rowe transaction, and the illegal issuance of securities in connection with the settlement; denied the petitioners pre trial discovery and an evidentiary hearing; summarily approved the settlement without making findings of fact and conclusions of law; did not write an opinion or give, in any manner, any clue as to his reasons for approving the settlement.

Upon appeal to the Court of Appeals for the third circuit, that court affirmed the summary determination of the district court by a judgment order which

was not accompanied by either an opinion or any memorandum stating its reasons for the affirmance.

Reasons For Granting The Writ

I

Certiorari Should Be Granted Because: The Court of Appeals for the Third Circuit Has So Far Departed From The Accepted and Usual Course of Judicial Proceedings, and Has So Far Sanctioned Such A Departure By The District Court, As To Call For An Exercise of The Supreme Court's Power of Supervision.

In this year of the Constitution, when the recent Iran-Contra congressional hearings have revealed how important to our democratic system is the need to prevent abuses of power by failure to adhere to the rule of law, the petitioners ask this court to exer-

cise its supervisory powers to remedy the abandonment of the rule of law by the Court of Appeals for the third circuit and the district court, the denial of constitutional rights, to the petitioners, and the disregard of the legal principles enunciated by this court and the Third Circuit in similar cases.

1. In Schlensky v Dorsey, 574 F 2d 131,147 (1978), the Third Circuit held that in determining the fairness of a settlement, the factors relevant to a class action apply equally to a derivative suit.

In Girsh v Jepson, 521 F 2d 153 (1975) the Third Circuit, quoting from the Second Circuit case of City of Detroit v Grinnell Corp,495 F 2d 448 (1978), held, at 157, that there are nine basically relevant factors which the district court must consider and weigh in determining the fairness of a

settlement. Thus, the Third Circuit in its previously reported opinions, agrees that fairness of compromise is ipso facto a question of fact. See also Plummer v Chemical Bank, 668 F 2d 654 at 659 (2d Cir 1982).

It is fundamental to American jurisprudence that questions of fact can be judicially determined only after the court has first granted an evidentiary hearing at which cross examination is the basic truth finder.

In Girsh,[3] 521 F 2d 153 (1975), the Third Circuit reversed the district court's approval of a settlement where the district court had denied an objector the opportunity to develop a record by means of cross-examination. The

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(3) The opinion was written by Judge Garth, who was one of the three-judge panel in the case at bar.

court quoted from Greenfield v Villager Industries, 483 F 2d 824 (3d Cir. 1973), which, at 831, held that a class action is a procedure which must comport with constitutional due process, and which, at 833, held that an objector at a hearing of a proposed settlement "is entitled to an opportunity to develop a record in support of his contentions by means of cross-examination and argument to the court." Walsh v Great Atlantic & Pacific Tea Company, 726 F 2d 956 (3d Cir. 1983), indicated, at 965, that due process rights of settlement objectors would be violated if they sought and were denied the opportunity to develop a record by cross-examination.

The denial of an evidentiary hearing to the petitioners was particularly egregious because the settlement was highly unusual, and involved an exchange of securities which had unique provi-

sions designed to make them extremely valuable to Triangle.

Fair market value is a question of fact requiring a determination of the value in the hands of the particular recipient and not the value "in a theoretical open market." Affiliated Ute Citizens of Utah v United States, 406 U.S. 128, 155 (1972); Seigal v Merrick, 441 F Supp 587, 590 (S.D.N.Y. 1977), appeal dismissed, 590 F 2d 35 (2d Cir. 1978); 65 Geo. L.J. 1093, 1100.

In the case at bar, the petitioners were denied the opportunity to show by cross examination and testimony, that Rothschild's valuation of the securities was incorrectly low because it was based on the value in a theoretical open market rather than the actual value to Triangle.

Neither the Third Circuit nor the district court explained on what basis

the petitioners were denied an evidentiary hearing and the right of cross examination, and why they did not apply the aforementioned principles to the case at bar.

2. In Schlensky v Dorsey, 574 F 2d 131, 147 (1978) the Third Circuit held that:

> The principal factor to be considered in determining the fairness of a settlement concluding a shareholders' derivative action is the extent of the benefit to be derived from the proposed settlement by the corporation, the real party in interest. In re Pittsburgh & LER Co, 543 F 2d 1058, 1068 (3d Cir., 1976).

To say the least, the affidavit of the petitioners' expert created a clear issue of fact requiring an evidentiary hearing at which both petitioners' expert and Rothschild would testify and be cross examined for the purpose of ascertaining whose securities valuations were correct. According to Schlensky, if pe-

tioners' expert were proved to be correct, the district court would have had to disapprove the settlement on this basis alone. For the settlement would be wholly without benefit to CJI. See also Seigal Merrick, 441 F Supp 587 (SDNY, 1977) appeal dismissed 590 F 2d 35 (2d Cir., 1978), where the court held that if a derivative action settlement involves an exchange of securities and, after an evidentiary hearing on the valuation of the securities, the court finds that the derivative corporation is giving more in value than it is gaining, the court must disapprove the settlement on this basis alone. See also In re Pittsburgh & Lake Erie RR Co. Sec. & Antitrust Lit, 543 F 2d 1058, 1068-70 (3rd Cir., 1976).

Neither the circuit court nor the district court explained what principle of law gave the district court the

right to disregard the above Schlensky principle, in view of the affidavit of petitioners' expert.

3. Schlensky, supra, and Grunin v. House of Pancakes, 513 F 2d 114, 124 (3d Cir., 1975) also stand for the proposition that the principal factor to be considered in determining the fairness of a settlement, is the adequacy of what is being received in settlement in light of the best possible recovery if the derivative action is not settled.

The district court could not have fulfilled this balancing requirement, because the record is barren of any evidence concerning the potentials of recovery in the underlying derivative action. But the record does contain the report of the expert hired by the plaintiff, which plaintiff's attorneys sought to hide, because it indicated that the derivative action would result

in a substantial recovery if the case went to trial.

To say the least, this report created an issue of fact as to the best possible recovery, and neither the third circuit nor the district court explained what rule of law gave them the right to disregard this issue by denying an evidentiary hearing with respect thereto.

4. Fed R Civ P. 52 (a) provides in pertinent part:

> In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon...

The Third Circuit has held as follows in decisions prior to the case at bar: the requirement that the hearing judge shall make findings of fact and conclusions of law, is mandatory. H. Prang Trucking Co. v Local Union No. 469, 613 F 2d 1235, 1238 (1980);

this requirement is so stringent that it cannot be waived by the parties. Berguido v Eastern Air Lines Inc., 369 F 2d 874, 877 (1966, cert den 391 US 966); the purpose of the requirement is to aid the trier of the facts in the process of adjuication, and to evoke care on the part of the trier of the facts in considering and adjudicating the facts. Roberts v Ross, 344 F 2d 747, 751-752 (1965); to aid the litigants and the appellate court by affording them a clear understanding of the ground or basis of the decision. Roberts v Ross, 344 F 2d 747 (1965); Berguido, supra, 369 F 2d at 877. See also Taylor v McKeithen, 407 US 191 (1972), where the Court of Appeals had reversed the district court without opinion and this court granted certiorari and reversed the Court of Appeals because this court did not have the benefit of the insight

of the Court of Appeals.

The making of findings of fact and conclusions of law is deemed so vital to the judicial process that, not only must they be supported by a proper evaluation of the facts and law, but as well, they must be based upon a competent evidentiary foundation. In Protective Committee v Anderson, 390 US 414 (1969) this court held at 434, that even where the district court has made findings and conclusions, "mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" is not enough, and at 437, that when a district court approves a settlement which is not based upon "well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors," its decision will not survive appellate review. In Girsh v Jepson 521 F 2d 153 (1975), the Third

Circuit reversed the district court's approval of the settlement and held that even though the district court, in approving the settlement, referred to the nine relevant factors which the district court must consider and weigh in determining the fairness of a settlement, it nevertheless failed to live up to its responsibility as the guardian of the rights of absentee class members, because it predicated its approval on a record which was inadequate because the objector had been denied both the right to compel answers to interrogatories and the right to participate effectively in the settlement hearing through cross examination.

In Roberts v Ross, 344 F 2d 747 (1965) and Schlensky v Dorsey 574 F 2d 131, 148 (1978) the Third Circuit vacated the district court's judgment and remanded the case to the district court

because the findings and conclusions did not adequately afford the Third Circuit any indication of the legal standard under which the evidence was considered. See also the following cases cited in Plummer v Chemical Bank, 668 F 2d 654, 659 (2d Cir., 1982), which held that the district court must make findings of fact and conclusions of law whenever the propriety of a settlement is in dispute: Cotton v Hinton, 559 F 2d 1326, 1331 (5th Cir., 1977); Mandujano v Basic Vegetable Products Inc., 541 F 2d 832,834-36 (9th Cir., 1976); Patterson v Newspaper and Mail Deliverers' Union, 384 F Supp 585, 588 (SDNY 1974) affd 514 F 2d 767 (2d Cir., 1975) cert den 427 US 911 (1976).

In the case at bar, the district judge did not make findings of fact and conclusions of law as he was required to by Rule 52(a). Considering the purposes

of Rule 52(a) as stated by the Third Circuit, the conclusion is inescapable that the district court did not consider and weigh the nine relevant factors which, according to Girsh, he was required to consider and weigh before he could be in a position to rule on the fairness of the settlement. Nor was he in a position to consider and weigh these factors. Because of his denial of an evidentiary hearing to the petitioners, he did not have an adequate record with competent evidence with respect to which he could apply the appropriate legal standards. All he had was a voluminous mountain of papers which were quantitative but wholly devoid of legal quality and competency, because he prevented their factual truths from being tested by cross examination in the time proven procedure of American constitutional jurisprudence. The conclusion

is inevitable that he succumbed to "the easy temptation or tendency to ill considered or even arbitrary action." NLRB v Amalgamated Clothing Workers of America, 430 F 2d 966, 972 (5th Cir., 1970).

In the circumstances, the Third Circuit was required by the determination of this court in Protective Committee and Taylor, and by the determinations of the Third Circuit in Roberts and Schlensky to vacate the district court's judgment. By disregarding these well established principles, the Third Circuit acted in an arbitrary manner and abandoned the rule of law.

5. In Grunin v International House of Pancakes, 513 F 2d 114, 123 (1974), the Third Circuit held that a settlement cannot be approved if it provides for a violation of law.

The issuance of the 320,000 newly created three vote per share common

stock by Board action without stockholder approval, redistributed the voting power of the common stockholders, took away from them 22% of their voting power, and gave it to Triangle.

In all the cases which petitioners have been able to find on the subject, it has been held, based upon the reasoning in the landmark case of Asarco v M.R.H. Holmes A. Court, 611 F Supp 468 (D.N.J. 1985), that equality of voting power among stockholders of the same class is a basic concept of New Jersey corporate law, and that neither N.J.S.A. 14A:7-2 nor any other provision of New Jersey corporate law confers upon the directors of a corporation the power to issue classes of shares which have differing voting rights within the same class, or which would redistribute voting power within a class. Asarco, 611 F Supp at 477; Amalgamated Sugar Co. v NL In-

dustries, Inc., 644 F Supp 1229, 1234 (SDNY 1986); Minstar Acquiring Corp. v AMF, 621 F Supp 1252, 1258 (SDNY 1985).

In the case at bar, just prior to the settlement exchange, controlling stockholder Triangle owned 340,439 shares of one vote common stock which represented 22% of the voting power of the common shares. By the exchange, the CJI board effectively took these 340,439 one vote shares, and converted them into 320,000 three vote common shares which represented 44% of the common share voting power. This is the very evil described in Asarco of a situation in which "corporate control would be manipulated by readjustment of intra-class voting rights," and constituting an "abuse of this power and the radical departure from traditional corporate practice which it represents," that leads to the conclusion "that New

Jersey courts would not read this power into the statute." Asarco, 611 F Supp at 478-79

Respondents' argument that the creation and issuance of the 320,000 three vote common shares did not violate N.J. S.A. 14A:702 because, prior to the issuance of the shares, Triangle had 44% of CJI's voting control and subsequent thereto it wound up with the same 44% voting control, emphasizes that Asarco principles were violated. The 44% voting control held by Triangle prior to the issuance of the three vote common shares, was held by means of 340,439 shares of one vote common stock to the extent of 22%, and another 625,000 one vote preferred shares to the extent of the additional 22%. By creating and issuing the 320,000 three vote common shares, the board took 22% of the voting power of the common shareholders and

transferred it to Triangle, thereby giving Triangle 44% voting control through the medium of 320,000 three vote common shares instead of through the medium of 340,439 one vote common shares and 625,000 one vote preferred shares.

The question of the illegality of the issuance of the 320,000 shares of three vote dual classification common stock, is one of exceptional importance to the bar, the investing public and investment bankers. For some period of time, the national securities exchanges and associations have been in dispute as to whether to refuse the listing of stock of corporations which issue dual classification shares. Because they could not agree on self regulation, the Securities and Exchange Commission has decided to intervene and proposed an amendment of Rule 19c-4

which would endorse a one share one vote concept and in effect make it illegal to issue dual classification shares. See CCH Fed Sec L Rep, number 1237,June 24, 1987, part II, One Share One Vote Proposed Disenfranchisement Rule - SEC Proposals ; National Law Journal, July 6, 1987, P 37 Is A 'One Share, One Vote' Rule a Good Idea ; Office of the Chief Economist Securities and Exchange Commission, July 16, 1987, Update-- The Effects of Dual-Class Recapitalizations on Shareholder Wealth: Including Evidence From 1986-1987 ; Dual Class Recapitalization and Shareholder Voting Rights, 87 Colum L Rev 106 (1987).

Despite the importance of this issue the district court approved the settlement by judgment order without explaining the relationship of Grunin and this issue, to its determination.

We can only surmise that the Third

Circuit affirmed by judgment order on the authority of its Internal Operating Procedures (IOP). If so, the Third Circuit disregarded the plain meaning of IOP.

The only provisions of its IOP upon which the Third Circuit could conceivably have relied, are ch 6 A 1 (a) and b (1), (4) or (5), which permit a judgment order only where: a written opinion would have no precedential value (ch 6 A 1 a) and either the judgment of the district court is based upon findings of fact (ch 6 A 1 b (1)), or no error of law appears (ch 6 A 1 b (4)), or the appeal is a civil diversity case, the result of which does not turn upon an interpretation of the Federal Rules of Civil Procedure (ch 6 A 1 b (5)).

In this case the district court did not make findings of fact or conclusions of law. The existing precedents of this

court and of the Third Circuit reveal that the district court committed substantial errors of law. The result in the case at bar turned upon whether FRCP 23.1 and constitutional due process, required the district court to grant the petitioners pre trial discovery and an evidentiary hearing with the right of cross examination, and whether FRCP 52 (a) required the district court to make findings of fact and conclusions of law. Hence the Third Circuit could not justify the use of a judgment order pursuant to sub (1) (4) or (5). Further, the important nature of the legal issues involved, and the conflict between the determination in this case and the existing precedents of this court and the Third Circuit, reveal that a written opinion would not only have had precedential value, but was an absolute necessity if the Third Circuit was to square its

determination with its existing precedents, and show that its determination was based on rule of law.

The Third Circuit disregarded the plain meaning of its IOP and utilized its IOP for the purpose of making an arbitrary determination which had the effect of abdicating the rule of law and concealing the violation of the petitioners' due process rights and the disregard of the principles enunciated by this court and the Third Circuit in similar cases. This case calls for the exercise by this court of its supervisory powers.

6. Congress has provided in 28 USC Sec 2071, that circuit courts may prescribe rules for the conduct of their own business. The great increase in the amount of judicial business in the circuit courts has caused them to adopt local rules governing whether, how, and in

what circumstances they may dispense with the writing of opinions by making summary orders.

The counterpart of this type of local rule in the Third Circuit is its Internal Operating Procedures (IOP) ch 6, which provides for the making of "judgment orders."

In US v Baynes, 548 F 2d 481 (1977), the Third Circuit held that its judgment order unaccompanied by an opinion, did not constitute a denial of constitutional due process because: the judgment of the district court was based on findings of fact which were not clearly erroneous; sufficient evidence justified the jury verdict; and the appeal did not require a new interpretation of a federal statute or rule or a new interpretation of a rule of constitutional law or of new rules of practice or procedure. In its opinion justifying its

IOP, and its failure to write an opinion, the Third Circuit cited with approval the Fifth Circuit case of NLRB v Amalgamated Clothing Workers of America, 430 F 2d 966,971-972 (5th Cir., 1970), where the Fifth Circuit wrote an opinion in justification of its Rule 21, its counterpart of the Third Circuit's IOP ch 6.

In NLRB, the Fifth Circuit pointed out that the ever growing increase in the amount of its business, required it to "exercise imaginative inventive resourcefulness in fashioning new methods or modifying older ones to enable us to at least stay abreast of this flood tide". 430 F 2d at 970. However, the court said, the rule must be "sparingly used," must never be applied "to avoid making a difficult or problemsome decision or to conceal divisive or disturbing issues," and must be used only by a

vigilant court "sensitive now to the factors which would make application of the Rule wrong or unwise or inappropriate." 430 F 2d 972-973.

In referring to the writing of opinions, the court pointed out that a "heavy obligation" of decisive significance is placed upon the court in the determination of whether "an opinion would have no precedential value." While this this means that the court "must determine in each case whether the outcome under review meets acceptable legal standards," the court must also bear in mind that "a most important function is the writing of opinions," which "serve a number of purposes," the two most significant of which are (1) that "an articulated discussion of the factors, legal, factual,or both, which lead the court to one rather than to another result, gives strength to the system and

reduces, if not eliminates, the easy temptation or tendency to ill considered or even arbitrary action by those having the awesome power of almost final review," and (2) the statement of "articulated reasons is the thing out of which law--and particularly judge-made law--grows," an "essential part of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability or the like." 430 F 2d at 972.

A third reason, inherent in the others, is that requiring courts to explain how their conclusions were justified by the application of rules of law, gives assurances to the litigants, the bar, and the public at large, that the determination is not arbitrary, and that all litigants are being equally treated. This fiat by rule of law requirement, is the essence of our judi-

cial system and its acceptance as a vital part of our democratic system of government.

In Frazier v Heebe, ____ US _____, 107 S ct 2607, 47 CCH S Ct Bull B 3653, (1987) the majority of this court held that the Supreme Court may exercise its inherent supervisory power to ensure that local court rules are consistent with "the principles of right and justice." By exercising its supervisory authority the court nullified a local rule of a Louisiana district court concerning the admission of lawyers to practice before it, on the ground that it discriminated against members of the Louisiana bar. Although the court minority disagreed with the majority's conclusion that this court's supervisory authority gave it the right to review local court rules that regulate admission to practice before that court, the

minority did agree that the Supreme Court has supervisory powers and authority to nullify court rules which are constitutionally infirm or which conflict with rules of procedure promulgated by the Supreme Court (107 S Ct at 2616). This includes the situation where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. Sup Ct Rules 17 1 (a).

In the case at bar, the Third Circuit applied its IOP and used a judgment order, as a means of avoiding the need to explain by what rule of law it and the district court were justified in departing from the principles enunciated in similar cases by this court, the Third Circuit and other circuit courts, and by

what principles of law the Third Circuit and district court were justified in reaching the conclusion that the petitioners were not denied constitutional due process: when, in the face of CPLR Rule 23.1 and constitutional due process, they were denied an evidentiary hearing and cross examination in a case replete with genuine issues of fact; and when the district court failed to make findings of fact and conclusions of law as required by Rule 52 (e); and when the Third Circuit and district court disregarded the decisions of this court and the Third Circuit in similar cases; and when the Third Circuit failed to write an opinion showing the relationship to their determinations of the various important legal issues involved.

By using the methodology of a judgment order to avoid explaining the reasons for its determination, the Third

Circuit made the kind of wrong, unwise and inappropriate application of the Third Circuit's IOP which the Fifth Circuit in NLRB cautioned the courts must guard against if the rule of law is to be safeguarded and the purposes for fashioning methods to enable the courts to stay abreast of the increase in business, are to be constitutionally upheld. The essence of what the Fifth Circuit was saying, which was cited with approval by the Third Circuit in US v Baynes, supra, is that the judgment order means of doing justice must not be used by the courts to conceal and justify injustice, departure from the rule of law, and denial of due process and equal protection of the laws.

As stated by Justice Douglas in Joint Anti Fascist Refugee Committee v McGrath, 341 US 123 at 179 (concurring opinion):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

If the Third Circuit judgment order determination is permissible pursuant to the Third Circuit's IOP, then the IOP should be nullified by this court's exercise of its supervisory powers, because it violates the due process clause of the fifth amendment, the equal protection component of the due process clause of the fifth amendment, and the first amendment freedom of speech and press right of access to civil proceedings. See Publicker Industries Inc. v. Cohen, 733 F 2d 1059 (3rd Cir., 1984). See also Greenholt v Nebraska, 442 US 1 at 40 (Marshall, J, dissenting opinion):

> And the obligation to justify a decision publicly would provide the assurance, critical to the appearance of fairness, that the Board's decision is not capricious.

It would also be violative of 28 US Sec 2071, the congressional enabling statute.

If, however, the Third Circuit misapplied its IOP, then this court should exercise its supervisory powers to grant certiorari and nullify this misapplication, which condones violations of petitioners' constitutional rights, which permits arbitrary determinations without applying the rule of law, and which conflicts with the decisions of this court and the Third Circuit in similar matters.(4)

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(4) In Taylor v McKeithen, 407 US 191 (1972), where the district court had made findings of fact and written an opinion, the Supreme Court majority in note 4 at 194 states its agreement

The argument may be advanced by the respondents, that the questions presented are now moot. This argument is predi-

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that courts of appeals, in most situations should have wide latitude on the determination of whether and how to write opinions. Yet it granted certiorari, vacated the judgment, and remanded the case to the circuit court because that court had reversed the district court's findings by only a short opinion and order. The minority of the court stated at 195-196 that in determining whether circuit action by a short opinion and order, as was done in Taylor, or by no opinion at all is permissible, consideration must be given to the need of the circuit courts to deal with the explosive increase in judicial business, citing NLRB v Amalgamated Clothing discussed on pages 43 to 45 of this petition. Thus, both the majority and minority of the court agree that there are limits to the latitude on decisions of courts of appeals as to whether or how to write opinions. The majority seems to suggest that a circuit court does not fulfill its judicial obligations when it decides by a short opinion and order, even though the district court has made findings and written an opinion, where the actual grounds of the circuit court's determination are not clear. By citing NLRB, the minority seem to suggest that the right of the circuit court to decide by a short opinion or no opinion is circumvented by the parameters and precautions set forth in the Fifth Circuit's opinion. In the case at bar it is clear that neither the district court nor the circuit court fulfilled their judicial responsibility of giving some explanation of the basis for their determinations. There were no findings, no opinions, no explanations of any kind. The egregious nature of the

cated upon the fact that during the pendency of the appeal, respondent Triangle engaged in voluntary acts in disregard of the appeal, and is untenable for the following reasons: the well accepted rule of the Third Circuit and all other courts is that an appeal cannot be mooted by the voluntary acts of a party in disregard of the appeal. Greenfield v Villager Industries, 483 F 2d 824 (3d Cir. 1973); (b) The settlement agreement in the case at bar provided for finality only after the determination of all appeals, and the claim of mootness is in direct contravention of the settlement agreement. Greenfield, 483 F 2d at 834.

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determinations is shown by the fact that the settlement could not have been appropriately approved unless they first balanced the various factors required by the Third Circuit in Girsh discussed on pp. 20, 21, 29-30 of this petition. Neither court did any of this, and it is impossible from the record, to ascertain how they reached their determinations according to law.

(c) The main part of the settlement, the exchange of securities, took place on December 25, 1985, two months before the notice to stockholders was sent and four months before the settlement was presented to the district court for approval; (d) This transaction can easily be undone by the court; (e) The payoff of the note had nothing to do with the settlement, and the appeal does not seek to undo that transaction; (f) Neither the interests of the investing public nor of the minority stockholders of CJI are involved in any mootness question, because the stockholders were specifically notified that they were not being asked to vote on the public offering which resulted in the floating of the junk bonds, and the investing public were put on notice of the pending appeal and the plan to use part of the proceeds of the offering to pay off the note; (g) The stock-

holders of CJI were not called upon to vote on the exchange of securities by Triangle during the pendency of the appeal, and this is a transaction which can easily be reversed since it involves only CJI and its controlling stockholder Triangle; (h) The present state of reincorporation of CJI is not involved in this appeal.

None of the occurrences on which the appellees might rely as the basis for their claim of mootness of the appeal, prevents this court from granting meaningful relief to the respondents, and from causing the undoing of Triangle's acts in disregard of the pending appeal.

Apart from all else, there is no way that the judicial abandonment of the rule of law, and the violations of petitioner's constitutional rights in this case, can be mooted. Nor is there any way

that the importance of this case to the public, can be mooted. The issues in this case involve the acceptance of our judicial system as a vital part of our democratic system.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner
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(212) 245-7575

Dated: New York, NY
August 25, 1987

APPENDIX

APPENDIX

Judgment Order of the US Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 86-5505

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc.

v

Triangle Industries, Inc., and Central Jersey Industries, Inc.

Dale Abrahams, Daniel Bruno, Marcene E. Edelman, Abraham Genderson, Ginny M. Grunley, John M. Hart, Joann M. Holmes, Philip Pfatt, Jr., Libby B. Pohoryles, Sharon H. Pohoryles, Larry D. Rollins, Rochelle Poulos, Norman Schaechter, Mahendra Shah, Edward S. Stoll, Linda W. Swan, Gary Abrahams, Lewis B. Coggan, Stephen L. Edelman, Charlotte Genderson, Kenneth M. Grunley, A. Stewart Holmes, Stephen G. Parker, Louis Pohoryles, Steven E. Pohoryles, James A. Poulos, Mona Schaechter, Geeta Shah, Jane M. Stoll, Carl Weber, Objectors,

Appellants

On Appeal from the United States District Court for the District of New Jersey
Civil No. 85-3103
(Honorable Herbert J. Stern)

Argued May 20, 1987

Before: SLOVITER, BECKER, and GARTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

[s/E.R. Becker]
Circuit Judge

ATTEST:

[s/Sally Mrvos]
Sally Mrvos, Clerk

DATED: MAY 27, 1987

JUDGMENT ORDER OF THE U.S.

COURT OF APPEALS FOR THE

THIRD CIRCUIT ON PETITION

FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5505

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc.

v.

Triangle Industries, Inc., and Central Jersey Industries, Inc.

Dale Abrahams, Daniel Bruno, Marcene E. Edelman, Abraham Genderson, Ginny M. Grunley, John M. Hart, Joann M. Holmes, Philip Pfatt, Jr., Libby B. Pohoryles, Sharon H. Pohoryles, Larry D. Rollins, Rochelle Poulos, Norman Schaechter, Mahendra Shah, Edward S. Stoll, Linda W. Swan, Gary Abrahams, Lewis B. Coggan, Stephen L. Edelman, Charlotte Genderson, Kenneth M. Grunley, A. Stewart Holmes, Stephen G. Parker, Louis Pohoryles, Steven E. Pohoryles, James A. Poulos, Mona Schaechter, Getta Shah, Edward S. Stoll, Jane M. Stoll, Carl Weber, Objectors,

Appellants

(Civil No. 85-3103)

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

PRESENT: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and GARTH,*
Circuit Judges.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* Judge Garth as to panel rehearing only.

BY THE COURT,

[s/E.R. Becker]
Circuit Judge

DATED: June 24, 1987

ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc., Plaintiff.	:	Civil Action No. 85-3103
v.		
TRIANGLE INDUSTRIES, INC., Defendant,	:	ORDER
and	:	and
CENTRAL JERSEY INDUSTRIES, INC.; Nominal Defendant.	:	JUDGMENT

This cause came on to be heard on plaintiff's motion for an order and judgment (i) approving the Settlement Agreement, and (ii) dismissing this action on the merits with prejudice and without costs, notice of said motion having been given, as directed by the Court, to the shareholders of Central Jersey Industries, Inc., the nominal defendant corporation on whose behalf these derivative actions were commenced; and the submissions of objecting shareholders having been considered; and the Court having granted such motion,

It is on this 3rd day of June, 1986,

ORDERED, ADJUDGED and DECREED that:

1. The Settlement Agreement herein is approved as fair, reasonable and adequate and the parties are authorized and directed to consummate the settlement and compromise of this action in accordance with the terms of said Settlement Agreement, except as to Paragraph 6(a).

2. The Court's copy of the Settlement Agreement shall be filed with the Clerk of the Court concurrently with this Order and Judgment.

3. All shareholders of Central Jersey Industries, Inc. ("CJI") are forever and permanently barred and enjoined from asserting, on behalf of themselves, or any class of CJI shareholders or derivatively on behalf of CJI, any claim or cause of action, against the defendant Triangle Industries, Inc. or its officers

or directors, which is embraced within the scope of the complaint herein, or which might have been alleged by reason of any matter or transaction referred to in the complaints herein, or arising out of or under the facts and circumstances set forth therein, or relating to any matter or transaction involved in the settlement and compromise of this action.

4. This action is dismissed on the merits with prejudice.

5. Plaintiff's reasonable attorney's fees and litigation disbursements are allowed for work performed up to and including April 28, 1986, without prejudice to an application for work performed subsequent to that date, in the amounts of $24,460.20 in disbursements, to be paid by Central Jersey Industries, Inc. within 30 days of the date of this Order; and attorney's fees of $84,855.00,

$34,855.00 of which is to be paid by Central Jersey Industries, Inc., within 30 days of the date of this Order, and the remainder to be paid by Triangle Industries, Inc. within one year of the date of this Order.

(s/Herbert J. Stern)
HERBERT J. STERN
United States District Judge

No. 87-319

Supreme Court, U.S.
FILED
SEP 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1987

DALE ABRAHAMS, DANIEL BRUNO, MARCENE E. EDELMAN, ABRAHAM GENDERSON, GINNY M. GRUNLEY, JOHN M. HART, JOANN M. HOLMES, PHILIP PFATT, JR., LIBBY B. POHORYLES, SHARON H. POHORYLES, LARRY D. ROLLINS, ROCHELLE POULOS, NORMAN SCHAECHTER, MAHENDRA SHAH, EDWARD S. STOLL, LINDA W. SWAN, GARY ABRAHAMS, LEWIS B. COGGAN, STEPHEN L. EDELMAN, CHARLOTTE GENDERSON, KENNETH M. GRUNLEY, A. STEWART HOLMES, STEPHEN G. PARKER, LOUIS POHORYLES, STEVEN E. POHORYLES, JAMES A. POULOS, MONA SCHAECHTER, GEETA SHAH, EDWARD S. STOLL, JANE M. STOLL, CARL WEBER, Objectors,

Petitioners,

vs.

LOUIS SHULMAN, Derivatively on Behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC., and CENTRAL JERSEY INDUSTRIES, INC.,

Respondents.

BRIEF OF RESPONDENT LOUIS SCHULMAN IN OPPOSITION TO PETITION FOR WRITE OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 87-319

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

DALE ABRAHAMS, et al.,

Petitioners,

vs.

LOUIS SHULMAN, et al.,

Respondents.

BRIEF OF RESPONDENT LOUIS SHULMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTRODUCTION

Respondent Louis Schulman, the derivative plaintiff in the District Court on behalf of nominal defendant Central Jersey Industries, Inc. ("CJI"), respectfully submits this brief in opposition to the petition for a writ of certiorari. The settlement, which provided an economic benefit of over $10 million to CJI, was approved by the District Court after a lengthy hearing, extensive briefing, provision for discovery by objectors,

and the development of an extensive factual record.[1] The District Court was unanimously affirmed by the Court of Appeals for the Third Circuit.

Persons allegedly holding 30,000 shares of CJI objected to the settlement and have appealed.[2]

Subsequent to its approval by the District Court, the settlement was consumated. CJI completed a public offering of over $387 million of debentures and preferred stock. In addition, with the approval of its shareholders, CJI changed its state of incorporation from New Jersey to Delaware and recapitalized and exchanged the securities provided in the settlement for still other securities. Objectors did not seek a stay of the consuma-

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1 Petitioners omit the entire record considered by either the District Court or the Court of Appeals.

2 Other objections were filed with the Court. Two were filed by two shareholders (who did not appeal), and one was filed by four shareholders who, after review of plaintiff's files by their attorney, withdrew their objections and expressed approval. Three other shareholders contacted plaintiff's counsel to express approval.

tion of the settlement or object in any way to these corporate transactions, which mooted their appeal.

The Action

This action, commenced in June 1985, challenged the purchase by CJI from its controlling stockholder, Triangle Industries, Inc. ("Triangle") of a Triangle subsidiary called Rowe Industries, Inc. ("Rowe") (the "Rowe Transaction"). The settlement achieved a reduction in CJI's economic burden, which had a present value to CJI in excess of $10 million; substantially reduced CJI's cash needs; shifted more of the risk of the transaction to Triangle; and improved CJI's chances of making a public offering to pay and redistribute its debt.

The settlement and the initial objections were thoroughly briefed and answered before District Court and received full consideration by Judge Stern at a hearing on April 28, 1986. Thereafter Objectors submitted additional contentions, which in turn, were fully briefed and answered.

In its Order dated June 3, 1986, the District Court rejected Objectors' argument and approved the settlement as fair, reasonable and adequate.

On appeal to the Court of Appeals, Petitioners recast their arguments once again and raised still new issues.

After extensive briefing and argument, the Court of Appeals affirmed the District Court and taxed costs against Petitioners.

Not satisfied, Petitioners sought en banc review. Unable to raise a single substantitive or procedural issue of merit, Petitioners' petition for rehearing was unanimously denied.

To date, ten judges have reviewed Petitioners' contentions and have found them to be without merit in law and fact. This Court, also, should summarily reject this Petition.

The Petition Should Be Denied[3]

A. There is no compelling need for this Court to review a moot question under New Jersey corporation law. There is no issue of federal or constitutional law in this diversity case - and there never has been.

B. The facts in the full record before District Court fully justified the approval of the settlement. Petitioners' version of the facts which omits or, worse, misstates, much of the record, cannot withstand scrutiny.

C. Transactions and events to which Petitioners did not object, subsequent to the District Court's approval of the settlement (as to which Petitioners did not seek a stay) rendered the appeal, and render this petition, moot and estop Petitioners from challenging the settlement. What is more, these transactions have made it impossible to grant the relief sought

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3 It is with no lack of respect to this Court that we are keeping this response short. Respondent Triangle will be submitting a more comprehensive brief in opposition to the Petition, in which we join. There is no need to multiply paper.

by the Petitioners. Thibaut v. Ourso, 705 F.2d 118, 120-121 (5th Cir. 1983); C&C Products, Inc. v. Messick, 700 F.2d 635, 636 (11th Cir. 1983); 9 Moore, Federal Practice, ¶208.03 at 8-9 (2d Ed. 1979) and cases cited therein. See, also In re Cantwell, 639 F.2d 1050 (3d Cir. 1981); Federal Savings & Loan Insurance Corp. v. Hykel, 468 F.2d 1386 (3d Cir. 1972).[4]

D. The law favors settlements. Williams v. First Nat'l Bank of Pauls Valley, 216 U.S. 582 (1910). Under the criteria of the Third Circuit, Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) (as well as other circuits), the District Court properly exercised its discretion in finding the settlement to be fair, reasonable and adequate. Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d

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4 Petitioners totally misread the opinions they cite. In Greenfield v. Villager Industries, 483 F.2d 824 (3d Cir. 1973) (a decision authored by a member of the Court of Appeals panel here), the notice of class settlement "was fatally defective," thereby violating due process, and the settlement agreement specifically provided that it would not "become effective, nor be consummated...if an appeal is taken..." (see Girsh v. Jepson, 521 F.2d 153, 159 (3d Cir. 1975), which explains Villager Industries). In United Properties Inv. v. Emporium Dept. Stores Inc., 379 F.2d 55 (8th cir. 1967), the settlement agreement specifically provided for repayment if settlement approval was reversed on appeal.

956, 965 (3d Cir. 1983); Shlensky v. Dorsey, 574 F.2d 131, 147 (3d Cir. 1978); Girsh v. Jepson, 521 F.2d 157; Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir.), cert. denied, 419 U.S. 900 (1974), reh. denied sub nom., Abate v. Pittsburgh Plate Glass Co., 420 U.S. 913 (1975). An appellate court's review of a settlement approval takes into consideration the record upon which the decision to approve was made. Girsh v. Jepson, 521 F.2d at 159. It is well established that the discretionary judgment of a district court should be given substantial deference and should be disturbed by the appellate court only when clearly erroneous. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 10 (1980).

E. The District Court did not abuse its discretion by denying the Objectors' demand for unfocused, extensive, additional discovery and a trial on the merits. Girsh v. Jepson, 521 F.2d 153; In re Amsted Industries Incorporated Litigation, 521 A.2d 1104 (Del. Ch. Ct., 1986) Judge Stern specifically requested that Objectors identify issues of disputed fact and give reasons why further discovery would be necessary for the

court to assess the fairness of the settlement. They did not. The District Court correctly denied their request.

F. In light of the extensive factual record, the absence of specific findings of fact in the opinions of the District Court or the Court of Appeals does not require that the discretion of the District Court in approving the settlement be overturned and the case remanded for extensive fact-finding proceedings.

Petitioners cite the requirement of fact-finding in non-jury trials under Fed. R. Civ. P. 52(a), but refer to not a single case for their novel contention that the District Court or the Court of Appeals must under all circumstances expend precious judicial resources and write a full opinion in aspiring to a derivative settlement.[5] They request this Court grant their petition and ultimately instruct the courts below to write extensive opinions.[6]

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5 Petitioners refer (quoted at pp. 8-9 of their brief) to the internal operating proceedings (IOP Chap 6) of the Third Circuit (which they did not even note anywhere below). Once more they are misguided: this action is a civil diversity case to which point b(5) of the rule directly refers.

6 Judge Stern has since retired from the bench and (footnote continued)

Where a sufficient factual record exists to support the decision of the district court, the reviewing court should affirm the district court's decision. In re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128, 1136 (8th cir. 1984) cert. denied sub nom., Reavis & McGrath v. Antinore, 469 U.S. 978 (1985).

In Flight Transportation, as here, the court of appeals was called upon to review a decision in which the district court had approved a settlement without making specific findings of fact. Relying upon the reasoning of the United States Supreme Court in Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, reh. denied, 391 U.S. 909 (1968), the court of appeals held that the absence of findings of fact was not fatal to the settlement:

> "Our review is made more difficult because the District Court did not write an opinion explaining why it deemed the Sharing Agreement to be fair, reasonable, and adequate. The Supreme Court has cautioned that, when reviewing the approval of a settlement,

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supposedly, a district judge unfamiliar with the proceeding would be directed to write the opinion.

> '[it] is essential...that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts of analysis of the law.'

Anderson, supra, 390 U.S. at 434, 88 S.Ct. at 1168. Nontheless, if

> 'the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reaons or the evidence on which they were based.'

Id. at 437, 88 S.ct. at 1170. Here, the record reflects that the District Court had before it the information necessary to consider the fairness of the Sharing Agreement. All the arguments made before us were presented to the District Court. Accordingly, we shall review the District Court's action on the basis of the record before us."

Id. at 1136 (emphasis added). The Court of Appeals then proceeded, solely on the basis of the record below, to affirm in part and vacate in part the District Court's approval of the settlement agreement, Id. at 1139.

We are confident that if this Court were required to review the record here, the facts will justify

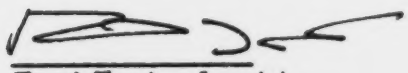
full affirmance of the decisions of the Court of Appeals and the District Court approving the Settlement.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: September 23, 1987

Respectfully Submitted,



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Supreme Court, U.S.
FILED
SEP 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DALE ABRAHAMS, *et al.*, Objectors,

Petitioners,

v.

LOUIS SHULMAN, Derivatively on Behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC.,
and CENTRAL JERSEY INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TRIANGLE INDUSTRIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming by judgment order the decision of the District Court approving -- after careful review of an extensive, fully developed factual record -- the arm's-length, negotiated settlement of a shareholders' derivative action, when a more detailed written opinion by the Court of Appeals would have no precedential value, when no error of law appears, and when the decision of the case does not turn on the interpretation of any Federal Rule of Civil Procedure or Rule of Evidence.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TRIANGLE INDUSTRIES, INC. IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

This case involves simply the decision of a District Court approving, after careful review of an extensive factual record, the arm's-length, negotiated settlement of a shareholders' derivative suit, and the subsequent unanimous ruling

of the Third Circuit Court of Appeals affirming by judgment order the District Court's decision. The courts below did not decide any issue of law that warrants further review. Indeed, the decisions rendered in this case turn upon the facts alone, and affect primarily the interests of the litigants alone.

Petitioners' lengthy arguments boil down to a few simple issues: Whether the lower courts were required to write detailed opinions, whether the District Court's decision was supported by the record and whether there was an error in the interpretation of state law or of local court procedures.

Not one of these issues presents a question of such importance as to warrant the granting of a writ of certiorari. First, the only questions of law petitioners have raised involve the interpretation either of state law or of internal court procedure. These questions do not rise to a level of general importance. In any event, petitioners are simply wrong in their interpretation and application of the relevant law and procedure.

Moreover, petitioners are wrong on the facts. Not only have they distorted and misstated the facts of this case -- as they consistently did in the courts below -- but they simply have chosen to ignore the vast quantity of evidence the District Court had before it when it considered whether or not to approve the settlement in question.

When one cuts through petitioners' dramatic (but ultimately baseless) protestations of abuse of judicial power and denial of due process, one sees petitioners' case for what

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it really is: an attempt to have this Court review the record developed below to determine whether the District Court had before it all relevant facts enabling it to make an informed, objective determination about the fairness, reasonableness and adequacy of the proposed settlement of the derivative action. However, that is certainly not a proper reason to grant certiorari.

B. The Parties

Respondents Triangle Industries, Inc. ("Triangle") and Central Jersey Industries, Inc. ("CJI") are both Delaware corporations. Petitioners' statement that CJI is a New Jersey corporation (petition at 9) is incorrect. CJI became a Delaware corporation in July of 1986. Petitioners are stockholders of CJI who together own only a small percentage of the outstanding common stock of that company.

C. The Rowe Transaction

In the latter part of 1984, Triangle purchased from certain shareholders of CJI approximately 22% of the outstanding capital stock of CJI. Following the purchase, in early April 1985, Triangle recommended that CJI acquire from Triangle all of the capital stock of Rowe International, Inc. ("Rowe"), a Triangle subsidiary, for the stated purpose of providing CJI with a much-needed operating company whose

business complimented that of CJI. (291a-97a, 301a, 328a-30a, 411a-12a, 767a-68a, 1082a, 1086a) *

In their petition, as in the courts below, petitioners state that Triangle "caused" CJI to purchase Rowe. Petition at 11-12. In so describing the Rowe transaction, petitioners once again have deliberately ignored the record, which shows that, in light of Triangle's 22% ownership of CJI's common stock, special care was taken and special procedures were followed in connection with this transaction, including the following:

(1) the appointment of a special committee of the CJI board to consider the proposal, consisting of the two members of the CJI board who had no relationship to Triangle;

(2) the retention of an experienced, well-regarded outside law firm to act as special counsel to the special committee; and

(3) the engagement by the special committee of an equally well-known and respected investment banking firm, L.F. Rothschild, Unterberg, Towbin ("Rothschild"), to evaluate the proposed transaction. (27a-28a, 768a-70a, 1086a)

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* References are to the joint appendix and supplement to joint appendix filed in the Third Circuit.

Petitioners assert, as they did below, that "Rothschild was in a fundamental conflict of interest with CJI." Petition at 15. The record shows otherwise. Although Rothschild previously had acted as one of a number of market makers in Triangle securities and had performed banking services for Triangle from time to time (24a, 51a, 304-05a), neither Rothschild nor the committee considered that firm's familiarity with Triangle to be an impairment to its ability to fulfill its responsibilities in connection with the Rowe transaction. Quite the contrary, it was believed by all concerned that Rothschild's experience with Triangle/Rowe was of real benefit to CJI. (304a-05a, 412a-14a, 724a-25a) In any event, the extent of the relationship with CJI was fully disclosed to the CJI board. (24a, 304a)

After their retention, special counsel to the committee, along with its members, negotiated with representatives of Triangle and its counsel regarding the terms of the proposed transaction including the ultimate price to be paid by CJI for Rowe, and Rothschild did its "due diligence." (32a-33a, 332a-38a, 416a *et seq.*, 1142a-65a) After a detailed analysis of the proposed transaction, the committee opined that the CJI board of directors should approve the transaction. Thereupon, based on the recommendation of the committee, the board of CJI unanimously approved the acquisition of Rowe. (51a-52a, 53a-57a, 1142a)

D. The Terms of the Acquisition

As a result of its board's action, CJI, on June 3, 1985, purchased all of the capital stock of Rowe for a price of

$68.5 million (652a, 1147a).* The purchase price was paid by CJI in the form of (a) 625,000 shares of cumulative convertible preferred stock, valued at $20 million (the "Series A preferred stock") and (b) a 15% note in the principal amount of $48.5 million, payable in one year, on June 3, 1986, or earlier upon the completion of a contemplated financing by CJI, and bearing an interest rate of 18% after maturity (the "note"). The Series A preferred stock paid dividends at a rate below the then-prevailing market rate for a company of CJI's credit standing, was convertible into CJI common stock on a share-for-share basis, and was entitled to vote with the outstanding common stock on a share-for-share basis. When added to its common stock holdings, the Series A preferred stock gave Triangle approximately 44.8% of the combined voting power of CJI's capital stock. Being equity, not debt, the Series A preferred stock also enhanced the balance sheet of CJI. (53a-57a, 772a, 1086a, 1087a-92a, 1142a *et seq.*)

E. The Derivative Action

On June 25, 1985, shortly after the consummation of the Rowe acquisition, respondent Shulman, the plaintiff below and a shareholder of CJI, filed this derivative action on behalf of CJI against Triangle. The complaint alleged that CJI's purchase of Rowe from Triangle was a waste of CJI's corporate assets for the benefit of Triangle and constituted a

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* Petitioners erroneously state -- once again -- that the purchase price of Rowe was $73.5 million. They also claim that the price paid for Rowe was 73.5 times Rowe's earnings. Petition at 12. The evidence submitted to the District Court showed this contention to be wildly inaccurate. (652a-53a, 657a)

breach by Triangle and its representatives on CJI's board of fiduciary duties allegedly owed to CJI shareholders. The main relief sought by Shulman was rescission of the Rowe transaction. (13a–14a) Triangle filed an answer denying the material allegations of the complaint, and pretrial discovery then ensued. (584a–87a, 773a, 795a–96a)

In November 1985, counsel for the parties in that action commenced discussions regarding a possible settlement of the action. During those discussions, counsel for Triangle advised Shulman's counsel that CJI management then had under consideration a recapitalization (the "recapitalization") which was intended, among other things, to improve CJI's cash flow. (587a–88a, 773a) Thereafter, counsel for Shulman, along with its retained expert,* participated with the representatives and counsel for CJI and Triangle in the negotiation of the specific terms of the recapitalization, in the hope that a basis for the settlement of the action might be found. (575a–76a, 587a–88a, 773a)

F. The Settlement

The result was a settlement in principle (the "settlement") that was publicly announced in a press release issued

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* Petitioners assert in their petition, as they did below, that plaintiff "retained" another "expert." Petition at 17. As was pointed out to the District Court, this is not true. (737a–38a, 942a–43a) In any event, the alleged "report" of that supposed expert, relied upon by the petitioners, was shown before the District Court to be entirely inaccurate. (650a–57a)

by CJI on November 29, 1985. As set forth in the press release, the settlement was "subject to the completion of certain pretrial discovery proceedings and to the negotiation and execution of a definitive settlement agreement, and [was] also subject to the approval of the settlement by the New Jersey District Court." (1257a)

Thereafter, Shulman completed his pretrial discovery, including review of additional documents and the taking of depositions. (774a) On February 13, 1986, a definitive settlement agreement was executed by the parties. (511a) Pursuant to an order of the District Court dated February 25, 1986, a notice of the settlement was mailed to CJI shareholders on March 3, 1986, advising them that a hearing on the settlement would be held on April 14, 1986 (subsequently adjourned to April 28, 1986). (533a, 760a) Prior to the hearing, the board of directors of CJI reviewed the terms of the settlement and, by the unanimous vote of its three non-Triangle members, approved the settlement "as being in the best interests of CJI and its shareholders." (608-09a)

Pursuant to the terms of the settlement, Triangle exchanged the shares of CJI common stock which it had purchased in 1984, and all of the Series A preferred stock obtained on the Rowe transaction, in return for 320,000 shares of a new Class C common stock of CJI ("Class C common stock"), 1,250,000 shares of a new Class B preferred stock ("Class B preferred stock"), warrants to purchase 625,000 shares of CJI common stock at $40 per share and warrants to purchase 500,000 shares of CJI common stock at $32 per

share. The Class C common stock carried three votes per share. The Class B preferred stock did not have voting rights, was not convertible into CJI common stock and was redeemable at any time by CJI at a price equal to its liquidation preference. (74a–80a, 774a–75a, 1105a *et seq.*)

Also, as part of the settlement, the terms of the note received from CJI in connection with the Rowe transaction were renegotiated by counsel for plaintiff to extend the maturity date for almost five years, and to reduce the interest payable subsequent to June 3, 1986, with an added limitation on payment of interest in the later years should CJI not meet certain minimum income levels. (524a–31a, 1224a, 1258a)

G. The Benefits of the Settlement

In connection with the hearing on the settlement, it was pointed out to the District Court that the settlement resulted in a number of significant benefits to CJI (as well as a number of corresponding disadvantages to the defendant, Triangle), including the following:

1. The exchange of CJI securities by Triangle and the modification of the note resulted in a substantial diminution of the annual dividend and interest obligations of CJI, thereby improving CJI's cash flow. (575a–80a, 659a, 775a–76a, 807a–08a, 1224a–25a)

2. Also, the record below reflected that, as a result of the arm's-length negotiations with plaintiff's counsel,

Triangle's share of both the vote and the earnings and equity potential of CJI actually *decreased*. (668a, 726a–27a, 776a, 1114a)

3. The evidence at the settlement hearing also revealed that, as a result of the recapitalization negotiated by plaintiff's counsel, between 5%–10% of the total consideration Triangle initially received from CJI for Rowe was shifted from dividend-paying preferred stock of CJI to warrants to acquire -- at $32 and $40 per share -- CJI common stock, then selling in the $22 range. (713a, 718a–19a, 777a, 806a)

4. The recapitalization further provided that, if Triangle exercised its warrants, CJI would not issue common stock but, instead, would pay the difference between the exercise price of the warrant and market price of the common stock in cash. Thus, any potential for Triangle to increase its percentage ownership of voting control of CJI as a result of the recapitalization was eliminated. (665a, 716a–17a, 730a, 777a, 1110a–11a) If the warrants were in the hands of and exercised by a party other than Triangle or any of its affiliates, the payment terms provided for in those circumstances assured that Triangle's position in CJI would be diluted by each such exercise of the warrants and Triangle would not be in a position to cause CJI to pay out needed cash. (665a, 718a–19a, 730a–31a, 777a–78a, 1110a, 1134a–35a)

Based solely on these and other direct financial benefits of the settlement, plaintiff's expert advised the District Court that the settlement had "a present value to CJI in excess of $10 million." (580a)

H. The Petitioners

On April 2, 1986, certain objectors (the "petitioners")* filed a "Notice of Intention to Object to Proposed Settlement," listing some 23 "objections" to the settlement. (559a) Three weeks later, on April 22, 1986, only four business days before the scheduled hearing on the settlement, petitioners, without first seeking permission of the District Court, served a 62-page "first" set of interrogatories and "first" request for production of documents, demanding extensive (and largely irrelevant) information and materials from both Shulman and Triangle. (1726a, 1729a)

Shulman's counsel sought to provide petitioners with responses to the interrogatories and, referring to the document demand, reminded their attorney that he had previously, in early March 1986, been given access to Shulman's litigation file and to all of the documents produced by Triangle during the discovery stage of the action. Counsel for petitioners conceded that he had not at that point reviewed the available discovery record nor any of the papers submitted to the District Court in support of the settlement. (1792a-95a)

I. The Settlement Hearing

Perhaps as a result, at the hearing on the settlement on April 28, 1986, petitioners did not attempt to conduct an

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* Not all of the persons who filed objections in the District Court participated in the subsequent appeal. For simplicity's sake, however, the objectors shall be referred to as "petitioners" herein.

evidentiary hearing, although they clearly had an opportunity to do so. (610a–34a) They did not seek to produce or examine any fact witnesses. Nor did they examine Shulman's expert (who was present at the hearing) or offer any expert testimony to rebut the affidavit of that expert on the subject of the value of the settlement to CJI. (631a)

Instead, petitioners did no more than advise the District Court that "[w]e require some prehearing procedures here." (613a) In response, the District Court informed petitioners that it would not, "at this stage of the proceeding," permit "shopping list" type of discovery. (625a) Quite reasonably, we submit, the District Court stated that "I am not inclined to embark upon massive discovery in this case unless I'm first persuaded there is a reason to." (621a)

Petitioners' assertion that the District Court denied them pretrial discovery and an evidentiary hearing, and "summarily" approved the settlement (petition at 18) is thus patently false and is contradicted by the record below. Indeed, in order to afford petitioners full opportunity to persuade it of the reasonableness of their position, the District Court, at the April 28 hearing, did the following:

First, it directed the parties immediately to turn over to petitioners "everything" -- *i.e.*, all documents that had been produced or obtained by the parties during the litigation and settlement stages of the case. (629a, 630a)

Second, the Court granted counsel for petitioners two weeks, as the Court put it, to "show us there is some

good-faith basis to believe that the proposed settlement is improvident or improper or in some way tramples the rights of the people who are objecting." (621a)

Prior to the April 28 hearing, the District Court had received affidavits and memoranda from Shulman and Triangle, supporting the fairness and reasonableness of the settlement and rebutting, point-by-point, petitioners' list of "objections." (559a, 573a, 575a, 583a, 594a-606a, 607a, 763a, 789a, 836a) Based upon his review of these previously submitted papers, the District Court, at the hearing, stated that "[M]y tentative feeling was that the settlement was appropriate. I was going to confirm it." (631a) However, the Court immediately went on to say the following:

> On the other hand, I don't want to bring down the curtain completely without giving these people [petitioners] a chance to be heard. If they show me enough to make me -- to move me, then I'm going to have to reconsider the whole thing, including opening up the discovery . . . . (631a-32a)

It was for this reason -- in order to give petitioners the opportunity to show that the settlement was inappropriate or that further discovery was in order -- that the District Court granted petitioners additional time to present their case.

J. The Post-Hearing Proceedings

Thereafter, all parties, including petitioners, submitted additional affidavits and extensive memoranda of law. In their papers, Shulman and Triangle rebutted each and

every claim made in opposition to the settlement on behalf of petitioners.

As a result, the District Court, in passing upon the settlement, had before it a substantial record -- both "factual" in the form of affidavits, and "legal" in the form of memoranda -- compiled by all parties, including petitioners. (646a, 650a, 658a, 710a, 784a, 862a, 923a) Based upon this record -- of which 1,852 pages later was submitted as the Appendix in the Third Circuit -- the District Court, on June 3, 1986, issued an order and judgment which, among other things, approved the settlement as "fair, reasonable and adequate" and authorized the parties to consummate the settlement. Petition at A5-A9. It is from this order and judgment that petitioners appealed to the Court of Appeals for the Third Circuit. (758a)

In connection with that appeal, however, petitioners did not seek a stay, from either the District Court or the Court of Appeals, of any steps in connection with the settlement. Nor did they request an expedited appeal in the Court of Appeals. Consequently, following the District Court's decision, the parties took steps in fulfillment of the terms of the settlement. (1590a, 1797a, 1813a) Among other things, CJI proceeded with a public financing intended to raise funds to pay off the note and for other purposes.

On August 1, 1986, CJI sold to the public a total of $100 million of convertible preferred stock and $287.5 million of subordinated debentures. (1583a, 1655a) The purchasers

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of these securities, of course, bought preferred stock and/or debentures in CJI which included Rowe, and a portion of the proceeds of the public offerings was, in fact, used by CJI to pay off the note which was issued to Triangle in connection with the Rowe transaction and which was modified by the settlement. Moreover, in connection with the issuance of the securities on the public offerings, CJI and Triangle agreed to a further exchange of the securities issued to Triangle in connection with the recapitalization in order to reduce the annual dividends payable on CJI's preferred stock. (1609a, 1679a)

As of today, therefore, the settlement has been consummated, Rowe is an integral part of CJI, the securities issued to Triangle in connection with the settlement have been exchanged for other CJI securities, and hundreds of public investors have, since the District Court's approval of the settlement, purchased new securities of CJI in reliance on the completion of the Rowe transaction and the settlement of this action.

K. The Appeal

In the Court of Appeals, petitioners argued, first, that they were denied an evidentiary hearing on the fairness of the settlement, and second, that the District Court erred in failing to issue a written opinion detailing the reasons for its approval of the settlement.

In so arguing, petitioners once again misstated the facts in blatant disregard of the record that had been devel-

oped below. For this reason, Triangle, CJI, and Shulman supplemented the three-volume appendix submitted by petitioners with an additional three volumes of exhibits -- all for the purpose of demonstrating to the Third Circuit that the District Court had based its decision on a fully developed record.

It was in the Court of Appeals that petitioners also raised for the first time the question of whether the new Class C common stock issued by CJI as part of the recapitalization violated the New Jersey Business Corporation Act, by granting holders of that new class of stock three votes per share, while holders of other common stock had one vote per share.

On May 27, 1987, a panel of the Court of Appeals unanimously affirmed the District Court's order by means of a judgment order. Petition at A1. A petition for panel rehearing and rehearing *en banc* was denied on June 24, 1987. Petition at A3.

REASONS FOR DENYING THE WRIT

The Petition Presents No Issue Worthy Of Review

The petition for writ of certiorari should be denied for the following reasons:

1. It raises no issue of sufficient importance warranting review by this Court.

2. The rulings below turn upon the facts of this particular case and are fully supported by the record developed below.

3. The decision of the courts below to rule without issuing written opinions detailing their findings and conclusions is entirely consistent with the decisions of this Court, of the Third Circuit and of other courts.

4. The Court of Appeals' ruling by judgment order in this case was authorized by that Court's own internal procedures, because (a) a detailed opinion would have no precedential value, (b) no error of law appeared in the District Court's decision, and (c) this is a civil diversity case, the decision of which does not turn upon the interpretation of the Federal Rules of Civil Procedure or any Rules of Evidence.

A. The Petition Raises No Substantial Question Worthy Of Review

The petition here, stripped of its lofty constitutional rhetoric, essentially involves only a few simple complaints:

- that the District Court's decision was not supported by the record;

- that the issuance of a new class of common stock as part of the settlement in issue violated New Jersey's Business Corporation Act, Section 14A:7-2;

- that the District Court failed to set forth in detail the reasons for its decision; and

- that the Third Circuit Court of Appeal's failure to write a lengthy opinion violated that Court's internal operating procedures.

On their face, none of these issues presents a question of significant general importance warranting review by this Court. The question of the importance of the issues involved in a case is of particular significance in the decision whether to grant a writ of certiorari. However, as this Court has noted previously, the concept of importance means "of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *See also Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (this Court does not "sit for the benefit of the particular litigants," and the problem presented to it must reach "beyond the academic or the episodic").

The issues presented by petitioners here do not satisfy any of these requirements. First, the interests involved in this case are those of the litigants alone.* Second, the decisions below turn solely on the facts of this particular case. Finally, to the extent petitioners have raised legal questions,

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* Arguably, the interests of the investors who participated in the public offering after the settlement was approved would be implicated at this stage of the litigation, but only in the event of a reversal and ultimate disapproval of the settlement.

those issues are limited to matters of state law and internal court procedure. Again, the resolution of these issues is of real importance only to the litigants in this case. In short, there simply are no issues presented here which are so unique, complex or universally significant as to warrant this Court's review.

B. This Court Should Not Grant Certiorari To Review The Sufficiency Of The Evidence

The ruling of the District Court was a factual determination of the fairness, reasonableness and adequacy of the terms of the settlement of the shareholders' derivative suit. No legal question was raised by petitioners before that Court. The recital above demonstrates that there was abundant evidence supporting the Court's approval of the settlement.

Petitioners now essentially ask this Court to overturn the District Court's factual assessment of the record by ruling that there was insufficient evidence in that record supporting the Court's decision, and by requiring that the now-consummated settlement be undone and additional evidentiary hearings be held. However, this Court has held that this is not a proper reason to grant certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Indeed, this is a particularly inappropriate case in which to grant certiorari because, as we have demonstrated, the petition frequently makes assertions contrary to the re-

cord. This is therefore not a case in which the Court may rely on petitioners to present a clear, concise and accurate picture of the evidence and issues below.

Inasmuch as petitioners cannot hope to have this Court review the factual assessment of the evidence, they wrap their argument in the cloak of a "legal" theory, namely, an alleged denial of due process resulting from the lower court's supposed refusal to order additional evidentiary hearings on the fairness of the settlement. But this is a theory having no application here. Once again, the record speaks for itself. Not only were petitioners given access to documents and other materials obtained during discovery in the shareholders' derivative litigation, but the District Court also granted petitioners additional time in which to develop the record further after the initial settlement hearing was held. Petitioners therefore had ample opportunity to develop evidence in opposition to the settlement, and in fact, a good deal of such evidence was before the Court.

Thus, the District Court, prior to making its decision, had before it all the information and arguments necessary to weigh carefully the relevant factors from both respondents' perspective and petitioners' perspective, and to reach an informed conclusion regarding the fairness of the settlement. Petitioners were granted all process which was their due.

C. The Lack Of Written Opinions From The Courts Below Raises No Issue Of A Denial Of Due Process Or A Departure From Accepted Judicial Procedures

1. The Orders Entered Below Are Consistent With The Decisions Of This Court And Of The Third Circuit

The fact that neither the District Court nor the Court of Appeals issued a written opinion detailing its respective findings of fact and conclusions of law poses no issue requiring review by this Court. On this point, petitioners simply are wrong on the law. The entry of orders below without opinions was entirely consistent with the decisions of this Court and of the Third Circuit.

First, petitioners' reliance on Rule 52(a) of the Federal Rules of Civil Procedure is misplaced. On its face, that rule applies only when actions are tried upon the facts without a jury, or when the court grants or refuses an interlocutory injunction. That is not the situation here. There was no ultimate determination here of the controverted, factual issues in this case. On the contrary, as we noted below, district courts are not expected or required to make ultimate determinations on issues of fact and law in approving settlements of derivative actions. *See, e.g., Girsh* v. *Jepson*, 521 F.2d 153, 160 (3d Cir. 1975); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). Each of the appellate court cases cited by petitioners on pages 27 and 28 of their petition involved either an action tried on the merits or an injunction. Neither of those situations is before this Court in the instant case.

Second, although some appellate courts have required district courts to issue opinions detailing the basis for their rulings on proposed settlements, *see, e.g.*, *Plummer* v. *Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977), this Court has previously indicated that the lack of a detailed opinion will not be fatal to the lower court's ruling so long as the record below was sufficiently developed to enable the reviewing court to determine that the lower court had before it all facts essential to its decision, and the record contained sufficient evidence supporting the court's decision. In *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 437 (1968), this Court stated:

> If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.

Petitioners also rely on *Taylor* v. *McKeithen*, 407 U.S. 191 (1972). In that case, this Court did vacate the judgment below and remand for further proceedings, but the Court's decision was not based solely on the lack of an opinion by the court of appeals. Rather, the Court in that case specifically noted, consistent with the *Protective Committee* case, that "this record does not fully inform us of the precise nature of the litigation," 407 U.S. at 194, and added:

> We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or

> how to write opinions. That is especially true with respect to summary affirmances. . . . But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District Judge. *Under the special circumstances of this case*, we are loath to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance. *Id.* at 194–95 n. 4. (Emphasis added.)

See also In re Flight Transportation Securities Litigation, 730 F.2d 1128, 1136 (8th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985) (the district court had before it the information necessary to consider the fairness of the proposed settlement); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 125 and n. 9 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975)(same). *

The issue, then, is not whether the District Court or the Court of Appeals set forth the basis for its conclusions in an opinion but, rather, whether the record supports those conclusions. As we already have demonstrated, the record below contained ample evidence favoring the settlement and, furthermore, demonstrates that the District Court had before it

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* We have found no Third Circuit decision supporting petitioners' claim that a detailed opinion is required in all cases involving a disputed settlement proposal. *See* Petition at 27–31. Of the Third Circuit cases cited by petitioners, only *Girsh* v. *Jepson*, *supra*, 521 F.2d 153 (3d Cir. 1975) and *Shlensky* v. *Dorsey*, 574 F.2d 131 (3d Cir. 1978), involved settlements of class actions. Petitioners' reference to *Shlensky* is misleading. In that case, the court in fact affirmed the district court's approval of (footnote continued)

sufficient evidence on both sides of the dispute to permit it to weigh carefully the relevant factors and reach an informed decision.*

2. The Judgment Order Of The Third Circuit Is Entirely Consistent With That Court's Internal Procedures

The decision of the Third Circuit to terminate the appeal of this case by means of a judgment order was clearly authorized by Chapter 6, Sections A(1)(a) and A(1)(b)(4) and (5) of that Court's Internal Operating Procedures (petition at 8–9) because (a) a written opinion in this case would have no

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the settlement. It vacated only that portion of the judgment dealing with the award of fees. 574 F.2d at 149, 152. In *Girsh*, the court noted that the district court's opinion did not adequately set forth its findings, but in keeping with the *Protective Committee* holding, it undertook its own evaluation of the record and particularly emphasized in vacating the district court's judgment that the record in that case, unlike the record here, was insufficiently developed to enable it to determine whether there was adequate support for the settlement in question. 521 F.2d at 159–160.

* Petitioners' criticism of the quality of the record in this case (petition at 32) is curious to say the least. While claiming that the record is "wholly devoid of legal quality and competency," petitioners in fact rely upon evidence within the record, particularly the so-called "expert" report, to support their argument that genuine issues of fact existed as to the propriety of the settlement. *See, e.g.*, Petition at 17, 26. Indeed, petitioners' frequent reference to the existence of such issues of fact belies their claim that the record was inadequately developed and did not contain sufficient evidence on both sides of the dispute.

precedential value, (b) no error of law by the District Court appeared, and (c) this is a civil diversity case that does not turn upon an interpretation of the Federal Rules of Civil Procedure or any Rule of Evidence.*

Simply stated, this is a straightforward, fairly routine dispute involving the arm's-length, negotiated settlement of a derivative action. There is nothing so unique about this case that the public interest would compel further review. See our discussion *supra* at 17-19. No issues of first impression or important questions affecting the public interest were raised or determined. *Compare Patterson* v. *Newspaper and Mail Deliverers' Union*, 384 F. Supp. 585, 588 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (more extensive discussion of merits of settlement by district court is warranted because interests involved in employment discrimination case are far broader than those of the particular litigants). In such a case, an extensive written opinion by the Third Circuit would have no precedential value.

Moreover, we have demonstrated, first, that the District Court's decision involved no legal questions, and second, that the absence of a written opinion from the District Court presents no error of law. See *supra* at 19-24.

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* Petitioners have not properly set forth the terms of Chapter 6, Section A(1)(b)(5) of the Third Circuit Internal Operating Procedures. That Section actually reads: "(5) That the appeal is a civil diversity case under 28 U.S.C. § 1332, the result of which does not turn upon an interpretation of the Federal Rules of Civil Procedure or any Rules of Evidence for the United States District Courts and Magistrates."

The only other legal matter raised by petitioners concerns whether the issuance by CJI of the new Class C common stock having three votes per share as part of the recapitalization violated Section 14A:7-2 of the New Jersey Business Corporation Act and the ruling of the court in *Asarco* v. *M.R.H. Holmes a Court*, 611 F. Supp. 468 (D.N.J. 1985). However, as we pointed out to the Court of Appeals, the issuance of the new Class C common stock is entirely consistent with the *Asarco* decision. What that case prohibits is the redistribution of voting power within a given class of stock. It does not prohibit the issuance of a new class of stock with superior voting rights. *Id.* at 477. The Class C common stock issued by CJI was an entirely new class of stock and, as such, could possess voting rights different from the other common stock.

Finally, the jurisdiction of the District Court in this case was founded upon diversity of citizenship. The decisions below do not turn upon the interpretation of any Federal Rule of Civil Procedure or any Rule of Evidence. We already have demonstrated, *supra* at 21, that petitioners' reliance on Rule 52(a) is entirely misplaced: On its face, that Rule does not apply here.

For all these reasons, the instant case is precisely the kind of case which the Third Circuit envisioned could be terminated expeditiously by means of a judgment order. The decision by the Third Circuit panel to so terminate this action is thus entirely consistent with that Court's internal procedures.

CONCLUSION

The petition for writ of certiorari presents no issue worthy of review by this Court, and should be denied.

New York, New York
September 25, 1987

Respectfully submitted,

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No. 87-319

Supreme Court, U.S.
FILED
OCT 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DALE ABRAHAMS et al.,

Petitioners,

vs.

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc. and Triangle Industries, Inc. and Central Jersey Industries, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 87-319

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DALE ABRAHAMS et al,

Petitioners,

vs.

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc. and Triangle Industries, Inc. and Central Jersey Industries, Inc.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

==========

REPLY BRIEF* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Documents Lodged With The Clerk of the Court**

We have lodged with the Clerk of the

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* Each of the two respondents has filed an opposition brief. In this reply brief, respondent Triangle Industries' brief is referred to as "T Br", and plaintiff-respondent Shulman's brief is referred to as "P Br."

Court, certified copies of the following documents which were part of the record below: transcript of the April 28, 1986 proceedings before the District Court (610a-634a), which refutes the endeavors of the petitioners to give this Court the misleading impression that the petitioners turned down the right to an evidentiary hearing; a letter dated April 29, 1986 from plaintiff-respondent's attorneys to the district judge, letter dated May 2, 1986 from objector-petitioners' attorneys to the district judge, and letter dated May 5, 1986 from the district judge to the attorneys for plaintiff-respondent, which collectively reveal that plaintiff-respondent's attorneys endeavored to hide the opinion received from an expert retained by them, that the original purchase of the Rowe

** The numbers on the bottom of each of the documents refer to the joint appendix filed in the Third Circuit.

shares from Triangle was unfair to CJI and would result in a substantial recovery in the derivative action (635a-639a); opinion of plaintiff-respondent's said expert, that the original Rowe transaction was unfair to the stockholders of CJI, which petitioners argue on PAGES 26-27 of the petition created an issue of fact which could not be decided without an evidentiary hearing (640a-644a); affidavit of petitioners' expert which petitioners argue on Pages 24-26 of their petition, created an issue of fact as to the valuation of the securities involved in the settlement exchange which could not be decided without an evidentiary hearing (647a-649a).

In Addition To Trying To Distort The Facts, The Respondents Have Made Admissions Which Reveal That Certiorari Should Be Granted

1. On pages 11-12 of T Br, petitioners, by deceptive-selective word

phrasing attempt to give this Court the misleading impression that on April 28, 1986, the district court wanted to proceed with an evidentiary hearing, and the petitioners refused to do so. A reading of the transcript reveals that the proceedings on that date involved nothing more than an application by the petitioners for an adjournment so that they could pursue prehearing procedures (612a-634a). Recognizing that in cases of this kind, the Third Circuit, like all other circuits, requires evidentiary hearings (Pet. P. 21-22), the plaintiff-respondent's attorneys requested the Court to hear the testimony of George Dormer, an investment banker who had assisted the plaintiff in the negotiation of the settlement, because he was going to be out of town. The Court refused to take any testimony (631a-632a), granted petittioners' requested adjournment, and indicated that he might make a decision

without holding any evidentiary hearing (634a). And this is what he did. He departed from the accepted and usual course of judicial proceedings by denying the petitioners pre trial discovery, by denying petitioners an evidentiary hearing with the right of cross examination, by deciding the matter on the basis of affidavits even though, in addition to the existence of many significant issues of fact particular to this case,* the Third Circuit, like other courts, has held that fairness of compromise is ipso facto a fact consideration involving the balancing of nine basically relevant factual factors. By sanctioning this

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* The other issues of fact involve: the fair market value of the securities given to Triangle by CJI, and particularly, whether they were to be valued on the basis of their value in the hands of Triangle rather than "in a theoretical open market" (Pet. P. 23); whether CJI was giving more than it was getting and hence paying to settle its own derivative suit (Pet. P. 25); the potential of recovery if the derivative suit were not settled (Pet. P. 27).

departure, in light of its previous decisions, the Third Circuit effectively disregarded FRCP 23.1, and held that settlement objectors are not entitled to the same due process and equal protection of the laws, as other litigants. One can only conclude that the district court and Third Circuit gave only boiler plate arbitrary approval to the settlement. For, if one were to assume that they applied any law to this case, one must conclude that they applied it in such a way as to discriminate against the petitioners. This is not justice; for justice can only mean equality of treatment by the courts.

On Page 19 of T Br, the petitioners have virtually conceded this departure from the accepted and usual course of judicial proceedings, by stating that "the ruling of the district court was a <u>factual determination</u> of the fairness, reasonableness and adequacy of the terms of the settlement..." (underscoring ours).

2. On Page 21-22 of T Br, respondents concede that the district court did not make findings of fact and conclusions of law; that neither the district court nor the Third Circuit wrote opinions or gave any explanations of the legal basis for their determinations; and that there are cases in the Second and Fifth Circuits which hold that district courts are required to issue opinions detailing the basis for their rulings on settlements. They argue that neither FRCP 52(a) nor the principles enunciated in these cases, applies to the case at bar because: (1) this case involves the fairness of a settlement rather than a final trial, and (2) the "record" sufficiently supports the fairness determination of the district court even though neither the district court nor Third Circuit explained how this is so.

The nub of respondents' argument is

that it was appropriate for the district court and Third Circuit to abandon the rule of law, and that this Court should sanction that abandonment by denying certiorari.

Petitioners, on the other hand, ask this Court to grant certiorari for the purpose of determining that in no circumstance is any Federal Court justified in abandoning the rule of law, and that every Federal judicial determination must be accompanied by an explanation showing that there was a legal basis therefor. Unless this is made clear, the way is left open for Federal Courts to make arbitrary, discriminatory and unprincipled determinations. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harvard Law Review 1,17,19 (1959). Federal Courts, especially this Court, are required to be bastions of principle, due process, and equality, if their integrity is to be upheld and they

are to continue to maintain public confidence.

In Schlensky v Dorsey, 574 F 2d 131, 147 (1978), the Third Circuit vacated the district court's determination that a settlement was fair, even though it had made findings of fact and conclusions of law, because those findings and conclusions did not adequately afford the Third Circuit any indication of the legal standards under which the evidence was considered. In Protective Committee for Independent Stockholders of the TMT Trailer Ferry v Anderson, 390 US 414 (1968), this Court held that, even where the district court has made findings and conclusions "mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law," is not enough, id at 434, and constitutes a legal deficiency sufficient to overcome the reluctance of a reviewing court to attack a settle-

ment approval. Id at 437. In Girsh v Jepson, 521 F 2d 153 (1975), the Third Circuit held that there are nine basically relevant factors which the district court must consider and weigh in determining the fairness of a settlement.

Taken together, these cases can only mean that especially in cases involving settlements, the district court is required to make findings of fact and conclusions of law, and to issue an opinion showing that it considered the nine basically relevant factors, and how it weighed and balanced them to reach its determination.

This conclusion also follows from the purposes behind FRCP 52(a) as stated by the Third Circuit and other circuits in the cases cited on Pages 27-33 of the petition, and the basic American jurisprudential system of rule by law. See also Winter Park Telephone Co. v Southern

Bell Telephone & Telegraph Co., 181 F 2d 341 (5th Cir. 1950); Browers v E.J. Rose Mfg. Co., 149 F 2d 612,616 (9th Cir., 1945) cert den 326 U S 753; 5A Moore's Fed. Practice, par. 5208 at 2378-2339 (2nd Ed., 1948), which stand for the proposition that in any situation where a court is called upon to make inferences from facts, it is required to make findings and conclusions.

Respondents argue that the abandonment of the rule of law in this case is not fatal because "the record" contains sufficient evidence supporting the determinations of the district court and Third Circuit. The simple answer is, that there is no "competent record" upon which any court could make a determination of whether the settlement was fair. The district court's departure from the accepted and usual course of judicial proceedings prevented such a record from being developed. Hence, from the point

of view of its evidentiary competency, the "record" in the case at bar is a nullity. Apart from this, even on the basis of the "incompetent" record, there is no way that this Court could ascertain if or how either the district court or the Third Circuit considered and weighed the nine Girsh factors.

3. On Page 26 of T Br, the respondents admit that the case involves the illegality of the issuance of the 320,000 three vote dual classification shares in light of Asarco v MRH Holmes A. Court, 611 F Supp 468 (D NJ 1985), and the other authorities cited by the petitioners on Pages 34-35 and 38 of the petition.* With this admission,

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* On Page 16 T Br, respondents incorrectly allege that petitioners' illegality argument was made for the first time in the Third Circuit. Respondents were caused by petitioners' illegality argument in the district court, to submit opinion letters of two law firms to the effect that the issuance of the shares was not illegal.

their argument on Pages 24-25 of their brief, that the Third Circuit was justified in making a judgment order because a written opinion in this case would have no precedential value, rings hollow. This factor alone foreclosed the Third Circuit from deciding by judgment order. IOP Ch 6A 1 (a).

Respondents' Page 20 T Br argument that this is a diversity case which does not turn upon an interpretation of the Federal Rules of Civil Procedure or any Rule of Evidence as required by IOP Ch 6 Sec A (1) (b) (5),* rings similarly hollow. This case turns upon an interpretation of FRCP 23.1: whether inherent in

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* In setting forth the provisions of IOP Ch 6 A (1) (b) (5) on P. 9 of the statues section of the petition, a typographical error was made by the inadvertent omission of one line. This has been corrected on the P. 25 footnote of T Br. Petitioners' arguments in the petition and the reply brief are predicated on the correct wording of this provision of the IOP.

the provision that a derivative action shall not be dismissed without the approval of the court and notice to the stockholders, is the requirement that objecting stockholders be accorded a due process evidentiary hearing; upon an interpretation of FRCP 52(a): whether the district court is required to make findings of fact and conclusions of law in determining the fairness of the settlement of a stockholders derivative action; upon a rule of evidence: the fundamental due process rule that a district court has no right to decide significant issues of fact, upon the basis of affidavits whose veracity is untested by cross examination.

4. Respondents' argument on P Br Pages 2 and 4 that certiorari should not be granted because the respondents' actions in disregard of the appeal mooted the case and cannot be undone, is wrong as a matter of law and fact, and was

anticipated and answered on Pages 52-56 of the petition. The suggestion that the petitioners are estopped from challenging the settlement because they did not try to stay the respondents from acting in disregard of the appeal, flies in the teeth of the well established rule that an appellant is not required to obtain a stay to prevent an appellee from acting in disregard of an appeal. 9 Moore's Federal Practice, Par. 2.08.03 at 8-9 (2d ed 1948) citing United Properties Inc v Emporium Dept. Stores Inc., 379 F 2d 72 (8th Cir 1967). The fact is, that none of the occurrences upon which the respondents rely for their claim of mootness, prevents the granting of meaningful relief to the petitioners, and from causing the undoing of Triangle's acts in disregard of the pending appeal. Nor could those occurrences moot the judicial abandonment of the rule of law and violations of petitioners' constitutional rights in this

case.

As evidenced by the fact that the Third Circuit affirmed the judgment of the district court instead of dismissing the appeal, it is apparent that the Third Circuit rejected respondents' mootness argument.

CONCLUSION

This Court should grant certiorari and determine that the courts below abandoned the rule of law and violated the petitioners' constitutional rights.

Respectfully submitted,

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Dated: New York, NY
October 7, 1987